

No. 44892-1-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

AARON DEMITRIS DUKES,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 12-1-00172-5  
The Honorable Linda CJ Lee, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. Aaron Dukes was denied his constitutional right to effective assistance of counsel when his trial attorney failed to object to the admission of irrelevant and prejudicial evidence of a prior bad act and crime.
2. The trial court erred when it admitted irrelevant and prejudicial evidence of a prior bad act and crime where there was no proper grounds for admission.
3. The trial court erred, and denied Aaron Dukes' constitutional right to present evidence in his defense, when it refused Dukes' request to question the alleged assault victim about a prior suicide attempt.
4. Cumulative error denied Aaron Dukes his constitutional right to a fair trial.
5. The court granted Aaron Dukes' motion to dismiss the unlawful possession of marijuana charge, but failed to indicate the dismissal in writing.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Was evidence of a single assault incident committed by Aaron Dukes five years earlier improperly admitted to establish the alleged domestic violence aggravator, where the aggravator

requires proof that the current offense is part of an “ongoing pattern” of abuse “manifested by multiple incidents”? (Assignment of Error 1 & 2)

2. Was Aaron Dukes denied his constitutional right to effective assistance of counsel when his trial attorney failed to object to the admission of evidence of an assault incident committed five years earlier, when the evidence was irrelevant and highly prejudicial? (Assignment of Error 1)
3. Did the trial court err when it admitted evidence of an assault incident committed by Aaron Dukes five years earlier, when there was no proper grounds for admission? (Assignment of Error 2)
4. Where the defense theory of the case is that someone other than Aaron Dukes committed the assault, and that the alleged victim was not credible, is evidence that the alleged victim was admitted to a psychiatric hospital after a failed suicide attempt relevant to support the defense theory of the case, and was Aaron Dukes thereby denied his constitutional right to present evidence in his defense when the trial court refused to allow Dukes to elicit this evidence at trial? (Assignment of Error 3)
5. Did the cumulative impact of the evidentiary errors deny Aaron

Dukes his right to a fair trial? (Assignment of Error 4)

6. Should the Judgment and Sentence be corrected to reflect the court's dismissal of the unlawful possession of marijuana charge? (Assignment of Error 5)

### **III. STATEMENT OF THE CASE**

#### **A. PROCEDURAL HISTORY**

The State charged Aaron Demitris Dukes by Amended Information with one count each of first degree assault (RCW 9A.36.011), unlawful possession of a firearm (RCW 9.41.040), unlawful possession of a controlled substance – marijuana (RCW 69.50.010, .4014), and violation of a domestic violence court order (RCW 26.50.110). (CP 5-7)

The State further alleged that the assault was aggravated because it “involved domestic violence” and was either: (1) “part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;” or (2) “manifested deliberate cruelty or intimidation of the victim” (RCW 9.94A.535(3)(h)). (CP 5-6). The State later filed a persistent offender notice, alleging that the charged assault would be Dukes’ third “strike” thereby mandating a life sentence. (CP 9)

Dukes entered a guilty plea before trial to the unlawful possession of a firearm charge. (CP 24-33; RP 48-57) At the close of the State's case, the trial court granted Dukes' motion to dismiss the unlawful possession of marijuana charge, based on the recent passage of Initiative 520, which legalized the possession of marijuana. (RP 527-29)

A jury found Dukes guilty of the two remaining charges, first degree assault and violation of a protective order. (CP 87-91; RP 581) The jury also found that the assault was an aggravated domestic violence offense. (RP 91; RP 581) However, the trial court did not impose an exceptional sentence, but instead imposed a life sentence after finding that Dukes had two prior strike offenses. (CP 300; RP 589-93, 603-05) This appeal timely follows. (CP 310)

#### B. SUBSTANTIVE FACTS

Wanda Wilson and Aaron Dukes met in 2006, and dated off-and-on and occasionally lived together for the next seven years. (RP 123, 124, 125, 126, 128) In January, 2012, Wilson was living in a garage apartment in Lakewood. (RP 126-27) Dukes sometimes stayed with her, had some mail delivered to the address, and kept some clothing and personal belongings there. (RP 128-29)

On the night of January 9, 2012, Dukes came to the apartment



and Wilson cooked him a spaghetti dinner. (RP 132, 133) While she cooked, however, Dukes left to visit a friend. (RP 135) He did not return when he said he would, so Wilson became frustrated. (RP 135) She went to the friend's house to find Dukes, and asked him to come home. (RP 135, 137) She said that things were tense between her and Dukes on the way home, but that things seemed alright. (RP 135-36)

After they returned home, they argued about Dukes being away so long. According to Wilson, Dukes became angry and pushed her to the kitchen floor. (RP 138) Wilson testified that Dukes left the kitchen then returned with a bottle of rubbing alcohol. (RP 138, 139) Wilson testified that Dukes poured the rubbing alcohol on her head, then lit her on fire. (RP 139, 140) The fire burned Wilson's hair, face and torso. (RP 140) According to Wilson, Dukes initially just watched, then tried to help her by using his hands to put the fire out. (RP 140) Dukes told Wilson he wanted to take care of her, so he gave her a phone to call 911. (RP 145)

Wilson told the 911 operator that someone broke into her home and set her on fire. (RP 78, 146-47) When Lakewood police officers arrived, they found Wilson standing in the entry of her home, and they could see smoke and smell burned flesh and hair. (RP 82)

The officers checked the residence for other people, but no one else was there. (RP 83) Wilson told the officers that two masked men broke in and burned her. (RP 84) The officers called for medical aid, and Wilson was transported to the hospital for treatment. (RP 84, 298)

Investigators did not find any evidence of a burglary. (RP 102, 455) They did find a bottle of rubbing alcohol on the bathroom counter, several disposable lighters scattered about the home, and a cap to the alcohol bottle on the living room table. (RP 101, 458, 461, 462) They also noted that a smoke detector had been removed from its mounting on the bedroom ceiling and placed on the bed. (RP 349, 379) The clothes that Wilson was wearing that night were also found soaking wet in the bathroom. (RP 173, 462)

Wilson's mother spoke to Dukes the next day, and Dukes told her that Wilson was burned from a grease fire while she was cooking. (RP 256) Investigators did not find evidence of a fire in the kitchen. (RP 350, 495) Wilson eventually told investigators and her sister that Dukes was the person who burned her. (RP 417, 444) Dukes was arrested soon after. (RP 280, 282)

Wilson suffered second and third degree burns over 12-percent of her body. (RP 308) She underwent several surgeries and

skin grafts, and has some permanent scarring. (RP 148-49, 151, 310-11, 312-13, 314, 318)

Wilson testified that there is a protective order prohibiting Dukes from contacting her. (RP 170-71; Exh. 22) Wilson also testified that she was “beaten up and left for dead” in 2007. (RP 154-55) She does not remember whether Dukes was the person who assaulted her then, but assumed it was. (RP 154-55, 159)

Lakewood police officers testified that they investigated an assault on Wilson in 2007. They found her alone on a street corner, crying and bleeding. (RP 390) She was transported to the hospital for treatment. (RP 393) She suffered lacerations to her head and face, which required stitches. (RP 399, 401) When police found and arrested Dukes for the assault, they noticed that there was blood on his clothes. (RP 398) Dukes was eventually convicted of second degree assault. (RP 169)

#### **IV. ARGUMENT & AUTHORITIES**

- A. ADMISSION OF EVIDENCE OF DUKES’ PRIOR ASSAULT AND ASSAULT CONVICTION WITHOUT OBJECTION AND WITHOUT PROPER GROUNDS UNDER ER 404(B) DENIED DUKES HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND TO A FAIR TRIAL.

Effective assistance of counsel is guaranteed by both U.S. Const. amd. VI and Wash. Const. art. I, § 22 (amend. x). Strickland

v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. As explained below, both prongs of the Strickland test are met here because evidence of Dukes' 2007 assault conviction was improperly admitted at trial and was highly prejudicial.

First, a defendant must only be tried for those offenses actually charged. Accordingly, evidence of other crimes must be

excluded unless shown to be relevant to a material issue and to be more probative than prejudicial. ER 404(b); State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

The State alleged that Dukes' current offense was aggravated because it "involved domestic violence" and is "part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time[.]" RCW 9.94A.535(3)(h)(i). Accordingly, the State asserted, and Dukes' counsel initially agreed, that testimony showing Dukes assaulted Wilson in 2007 and was subsequently convicted of second degree assault was relevant to prove the aggravator.<sup>1</sup> (RP 4, 155-56) The trial court admitted evidence of the assault and conviction after finding that the evidence was relevant to establish the aggravator and was more probative than prejudicial. (RP 370-72) But under the plain language of the sentencing statute, there was no "pattern of abuse" and therefore evidence of the 2007 assault and conviction was inadmissible and irrelevant.

Issues of statutory construction are reviewed de novo. State

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<sup>1</sup> Defense counsel indicated his belief that the existence of the assault conviction was admissible, but argued that the details of the crime should be limited. (RP 4, 155-56, 364-65)

v. Lilyblad, 163 Wn.2d 1, 6, 177 P.3d 686 (2008). If the plain words of a statute are unambiguous, the court need not inquire further. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). But if the language is ambiguous, the rule of lenity applies and requires the statute to be interpreted in the defendant's favor unless there is legislative intent to the contrary. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

In order for the domestic violence aggravator to apply, the current offense must be part of an “ongoing pattern” of abuse. RCW 9.94A.535(3)(h)(i). Ongoing is defined as being “actually in process[.]” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1576 (1993). And under the terms of the statute, a pattern is established by “multiple incidents over a prolonged period of time[.]” RCW 9.94A.535(3)(h)(i). Multiple is defined as “consisting of, including, or involving more than one.” WEBSTER’S 1485.

By its plain language, the statute requires that there be a pattern that is “actually in process” or already existing, and requires that the current offense be a part of that pattern. One prior incident is not multiple incidents and does not constitute an “ongoing pattern.” Accordingly, there is no “ongoing pattern” for this current offense to be a “part of.”

This interpretation is consistent with the legislative intent of this aggravator: “The legislative history also makes abundantly clear that the intent of the statute was to address the serial domestic violence offender[.]” State v. Sweat, 174 Wn. App. 126, 131, 297 P.3d 73 (2013) (citing S.B. Rep. on S.B. 5208, at 3-4, 61st Leg., Reg. Sess. (Wash. 2009)). The intent of the statute was not to punish more severely the person who once, five years prior, committed a similar offense.

Accordingly, if trial counsel had properly objected, this evidence would not have been admitted.<sup>2</sup> The trial court’s decision to allow the State to present this evidence was nevertheless an abuse of discretion because a trial court should not admit evidence of other crimes, wrongs or acts unless there is a legitimate purpose for its admission. ER 404(b); State v. Powell, 126 Wn.2d 244, 258, 262, 893 P.2d 615 (1995). The evidence should not be admitted unless it is relevant and necessary to prove an essential fact. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Laureano, 101 Wn.2d 745, 764, 682 P.2d 889 (1984).

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<sup>2</sup> Trial counsel did eventually argue that the crime was remote in time and did not establish a pattern, but this was after Wilson had already testified that she was assaulted in 2007 and that Dukes was subsequently convicted for the crime. (RP 154-55, 159-69, 365)

The State argued below, and may argue again on appeal, that the 2007 assault and conviction were alternatively admissible to explain why Wilson did not initially identify Dukes as her attacker, and instead told the 911 operator and responding police officer that two unknown men entered her home and committed the crime. (CP 18-19; RP 84, 146-47, 166) However, the State had ample evidence, aside from this otherwise inadmissible crime evidence, to explain why Wilson may have changed her story.

Wilson testified that she loved Dukes and was trying to protect him. (RP 201) She also testified that Dukes was present when she called 911. (RP 145) Most jurors would naturally understand that, under those circumstances, Wilson might be reluctant to immediately identify Dukes. In fact, in closing arguments, the State made the point:

Love is a powerful thing. And actually, her bias caused her to protect him on the day this happened. . . . Why would she say it was random burglars and not him? Love is a powerful thing. She was trying to stand by her man. . . . And then there's just fear. I mean, he wasn't caught until the next day . . . he was at large. He could come back.

(RP 565-67) Clearly, the 2007 incident and conviction were not relevant and necessary, and would not have been admitted under this alternative theory.



Admission of this evidence prejudiced Dukes' right to a fair trial. It is well recognized that evidence of a defendant's prior criminal history is highly prejudicial because it tends to shift the jury's focus from the merits of the charge to the defendant's general propensity for criminality. State v. Calegar, 133 Wn.2d 718, 724, 947 P.2d 235 (1997); State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (1997). Reference to prior crimes has extraordinary potential to mislead a jury into believing it is being told that the defendant is a "bad" person and is therefore guilty of the crime charged. State v. Newton, 109 Wn.2d 69, 76, 743 P.2d 254 (1987). Even the prosecutor in this case acknowledged that "prior convictions can be very influencing to the jury." (RP 17)

Furthermore, the potential for prejudice is even higher where the prior conviction is for an offense that is identical to the current charge. See State v. Pam, 98 Wn.2d 748, 761-62, 659 P.2d 454 (1983). That is due to "the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time." As a general guide, those convictions which are for the same crime should be admitted sparingly[.]” Newton, 109 Wn.2d at 77 (quoting Gordon v. United States, 383 F.2d 936, 940 (D.C.Cir.1967)). Accordingly, the fact that Dukes' prior crime was also a domestic violence assault

tends to imply to the jury that Dukes has a propensity to commit domestic violence assaults, and therefore must have acted in conformity with that propensity on the night in question.

Trial counsel's failure to properly object to the admission of this evidence was ineffective, and the trial court's improper admission of the evidence even without a proper objection was an abuse of discretion. The errors were prejudicial and denied Dukes his right to effective assistance of counsel and a fair trial. Accordingly, Dukes' convictions should be reversed and his case remanded for a new trial.

B. THE TRIAL COURT'S REFUSAL TO ALLOW DUKES TO QUESTION WILSON ABOUT HER PAST SUICIDE ATTEMPT DENIED DUKES HIS RIGHT TO PRESENT A DEFENSE.

During cross examination of Wilson, Dukes' counsel attempted to elicit testimony that Wilson was admitted to Western State Hospital after a suicide attempt. Dukes asserted that an attempt to harm herself in the past was relevant because one of the issues in this case was the identity of the person who harmed Wilson this time. (RP 220) The State objected, and the trial court sustained the objection. (RP 219-20) The trial court's decision on the admissibility of evidence is reviewed for abuse of discretion. See State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999).

The sixth amendment to the United States Constitution and art. 1, § 22 of the Washington Constitution grant criminal defendants the right to present evidence and testimony in their own defense. See Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967); State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). The evidence must be both relevant and otherwise admissible. See State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). Evidence is relevant, and therefore admissible, when it has “any tendency to make the existence of any fact ... more ... or less probable,” provided other rules do not preclude its admission. ER 401, ER 402. Furthermore, facts tending to establish a party's theory of the case will generally be found to be relevant. State v. Mak, 105 Wn.2d 692, 703, 718 P.2d 407 (1986).

Dukes’ defense was general denial, and he argued that the State’s evidence did not prove that he committed the charged acts. (RP 569-70) Dukes questioned whether Wilson was being truthful, and pointed out the numerous inconsistencies between her statements to police and her testimony at trial. (RP 205-06, 212-15, 570-71, 574) The idea that Wilson would do something so terrible to herself would not have been believable, unless there was some evidence that she had, in the past, tried to harm herself. In fact, there

was, and so severely that she was admitted to Western State Hospital for treatment. Thus, evidence of a past suicide attempt was critically relevant in this case.

Accordingly, the trial court's refusal to allow Dukes to elicit this testimony was error because the evidence was relevant to his theory of the case and not otherwise inadmissible. This error also denied Dukes his constitutional right to present a defense.

C. CUMULATIVE ERROR DENIED DUKES A FAIR TRIAL.

An accumulation of non-reversible errors may deny a defendant a fair trial. Perrett, 86 Wn. App. at 322. Where it appears reasonably probable that the cumulative effect of the trial errors materially effected the outcome of the trial, reversal is required. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). As argued in detail above, each of the claimed errors severely prejudiced Dukes' right to a fair trial and materially effected the outcome of trial.

However, even if any one of the above issues standing alone does not warrant reversal of Dukes' conviction, the cumulative effect of these errors materially effected the outcome of the trial, and Dukes' conviction should be reversed. See Perrett, 86 Wn. App. at 322-23 (and cases cited therein).

D. THE TRIAL COURT PROPERLY GRANTED DUKES' MOTION TO DISMISS THE UNLAWFUL POSSESSION OF MARIJUANA CHARGE BUT FAILED TO SET FORTH ITS RULING IN WRITING.

The court dismissed count 3, unlawful possession of a controlled substance – marijuana. (RP 527-29) However, the court did not enter a written order dismissing this count. And the Judgment and Sentence, which contains a blank space for the court to list dismissed charges, also does not mention the charge. (CP 298)

This Court should remand for amendment of the Judgment and Sentence to reflect the trial court's dismissal of count 3 or, in the alternative, enter an order dismissing that count. See State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form).

## V. CONCLUSION

Evidence of a **single** prior assault incident does not establish an "ongoing pattern" of abuse that the current offense can be a part of. Therefore, evidence relating to the 2007 assault and conviction was not admissible to prove the alleged domestic violence aggravator. The evidence also was not admissible for any other proper purpose. Trial counsel's failure to object to admission of this evidence, and the trial court's decision to admit it without having valid

grounds to do so, denied Dukes his constitutional right to effective assistance of counsel and a fair trial. Dukes' constitutional right to present evidence in his defense was also violated when the trial court refused to allow him to question Wilson about a prior suicide attempt and subsequent admission to a psychiatric hospital. These errors, alone or together, requires that Dukes' convictions be reversed and his case remanded for a new trial.

And finally, this Court should direct that the Judgment and Sentence be corrected to reflect the trial court's dismissal of the unlawful possession of a controlled substance count.

DATED: December 9, 2013



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Attorney for Aaron D. Dukes

**CERTIFICATE OF MAILING**

I certify that on 12/09/13, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Aaron D. Dukes, DOC# 836418, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

**December 09, 2013 - 10:22 AM**

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